83-1575

Office - Supreme Court, U.S.
FILED
APR 25 1984
STEVAS

No.

In the Supreme Court of the United States

October Term, 1983

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents,

v.

JOHN J. AYOOB, HUGO IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHENER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHEAL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners.

Respondents' Brief In Opposition

PAUL H. TITUS, Esquire
SUSAN A. GROMIS, Esquire
TITUS MARCUS & SHAPIRA
624 Oliver Building
Pittsburgh, PA 15222
(412) 471-3490

Counsel for Respondents

QUESTIONS PRESENTED FOR REVIEW

1. Where petitioners' judicial immunity argument was previously decided adversely to petitioners by the Court of Appeals for the Third Circuit in its earlier decision in this case, *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980), certiorari was denied by this Court on this issue, 449 U.S. 1102 (1981), and the Third Circuit refused to review the question again based upon the doctrine of law of the case, F.2d (3d Cir. 1984), should petitioners be precluded from obtaining review before this Court?

2. Are there special and important reasons justifying this Court's granting of review on writ of certiorari to review a trial court's exercise of discretion with respect to the reasonableness of an award of counsel fees pursuant to 42 U.S.C. §1988?

TABLE OF CONTENTS

Page

1. QUESTIONS PRESENTED FOR REVIEW..... i
2. TABLE OF CONTENTS ii
3. TABLE OF AUTHORITIES iii
4. SUMMARY OF ARGUMENT 1
5. ARGUMENT..... 2
6. CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Page

Arizona v. California, U.S. , 103 S.Ct. 1382 (1983) 3

Blum v. Stenson, 52 U.S.L.W. 4377 (March 21, 1984) (No. 81-1374) 5

Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) 2

Lehman v. Gulf Oil Corporation, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) 2

Montana v. United States, 440 U.S. 147 (1979) 3

Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) 2

Morrison v. Ayoob, F.2d (3d Cir. 1984) 4

STATUTES

42 U.S.C. §1988 ..... 2, 5

SUMMARY OF ARGUMENT

In 1980 the United States Court of Appeals for the Third Circuit held as a matter of law that judicial immunity did not bar the award of attorney's fees to respondents, and this Court denied review on writ of certiorari. In 1984, upon appeal by petitioners following remand, the Court of Appeals for the Third Circuit held that its prior judicial immunity holding was the law of the case, precluding the reconsideration of this question. To permit petitioners to seek review of an issue which has already been finally decided against them violates law of the the case principles and encourages parties to prolong litigation and seek repeated appellate review.

The district court's award of counsel fees included fees for separate counsel who handled the hearings to determine an appropriate award to the legal services organization which represented the prevailing party. The district court's exercise of discretion in awarding fees was affirmed by the court of appeals. Clearly there are no special or important reasons justifying review of the district court's exercise of discretion.

ARGUMENT

1. The holding that judicial immunity does not preclude an award of attorney's fees in this case has been finally determined and may not be relitigated here.

In 1980 the United States Court of Appeals for the Third Circuit held that: (1) respondents were prevailing parties within the meaning of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988; (2) judicial immunity did not bar recovery of attorney's fees from justices of the peace in their official capacities; and (3) such award was not limited by the budgets of the individual district justices' offices. 627 F.2d 669. Petitioners' petition for writ of certiorari to this Court on those questions was denied. 449 U.S. 1102 (1981). After remand to the district court to determine an appropriate attorney's fees award, petitioners appealed from that award to the United States Court of Appeals for the Third Circuit and again sought reversal on the judicial immunity question.

The Third Circuit correctly held that its reconsideration of the judicial immunity question was barred by the doctrine of the law of the case. Quoting from the decisions of the Fifth Circuit Court of Appeals in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975) and the Ninth Circuit in *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979), the Third Circuit stated:

> This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all "if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

> While the "law of the case" doctrine is not "an inexorable command," the prior decision of legal issues should be followed on a later appeal "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha, supra,* 377 F.2d [428] at 431-32 (5th Cir. 1967).

This Court has similarly reaffirmed on numerous occasions its commitment to the precept that "an issue once determined by a competent court is conclusive." *Arizona v. California,* U.S. , , 103 S.Ct. 1382, 1392 (1983). The policy reasons underlying this rule were aptly stated by this Court in *Montana v. United States*:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. 147, 153-154 (1979).

So too in the present case, where petitioners have previously had a full and fair opportunity to litigate the issue of liability and have had a full appellate review including seeking this Court's review on writ of certiorari, petitioners may not again subject respondents and the judicial system to further relitigation of this question. Petitioners' own oft-stated concern in this protracted litigation for conserving judicial resources and public funds would be best served by allowing this matter to come to an end. Even if this Court should decide the issue of the immunity of justices of the peace in a manner contrary to the original decision

in this case in the pending appeal, the within petition for certiorari should be denied nonetheless. This Court ought not reward successive resort to full appellate review on a matter which has already been finally decided.

2. **The reasonableness of the award of attorney's fees for the presentation of the fee petition is not a question meriting this Court's review on writ of certiorari.**

In the original district court proceedings the justices of the peace were represented by staff counsel for the Administrative Office of the Pennsylvania Courts. On appeal their position was argued by eminent private counsel including a distinguished former Justice of the Pennsylvania Supreme Court. On remand to the district court Neighborhood Legal Services Association sought the assistance of separate counsel in presenting the petition for fees. Petitioners contend in their Petition that the time spent by that private law firm in preparing and presenting the fee petition, and the fees charged for their work, exceed that which would have been expended by Neighborhood Legal Services Association for prosecution of the fee petition. Petitioners claim that these contentions merit this Court's review on writ of certiorari.

With respect to the time expended by the private counsel, the Court of Appeals affirmed the findings of the district court and held that "[t]he time the Titus firm spent preparing the Neighborhood Legal Services' fee petition is the time the organization would have expended had it prosecuted its own petition for fees." F.2d , (1984). Petitioners' efforts to have this Court reconsider and overturn such an express factual finding is simply inappropriate for review. This Court does not use its writ of certiorari to reconsider fact finding by lower federal courts.

With respect to petitioners' second contention, *i.e.*, that the rates charged by private counsel exceeded that which would have been charged by Neighborhood Legal Services and that the award was therefore unreasonable, the very recent decision of this Court in *Blum v. Stenson*, 52 U.S.L.W. 4377 (March 21, 1984) (No. 81-1374) disposes of any argument which petitioners might make.

> The statute and legislative history [of 42 U.S.C. §1988] establish that "reasonable fees" under §1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel.

52 U.S.L.W. at 4379.

Since there exist no special or important reasons justifying this Court's review of the district court's exercise of discretion in making the attorney's fees award in this case, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons described herein, respondents respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

/s/ PAUL H. TITUS
PAUL H. TITUS
SUSAN A. GROMIS
TITUS MARCUS & SHAPIRA
624 Oliver Building
Pittsburgh, PA 15222
(412) 471-3490
Counsel for Respondents

DATED: April 24, 1984

CERTIFICATE OF SERVICE

This is to certify that three copies of the Brief of Respondent in Opposition were served upon opposing counsel this 24th day of April, 1984, by depositing in the U.S. Mail, with proper postage affixed, addressed to:

Charles W. Johns, Esquire
Alan C. Milstein, Esquire
1414 Three Penn Center Plaza
Philadelphia, PA 19102

/s/ PAUL H. TITUS